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CHARLES ELMORE CR
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No. 17..., Orig.

IN THE

Supreme Court of the United States

EX PARTE, THE BAKELITE CORPORATION,

Petitioner,

In the Matter

of

The Investigation of alleged unfair methods of competition and unfair acts in the importation and sale of Synthetic Phenolic Resin, Form C, and articles made wholly or in part thereof.

MOTION AND PETITION FOR WRIT OF PROHIBITION

ALBERT MACC. BARNES, Jr.,
Attorney for Petitioner.

PRESS OF FREMONT PAYNE, NEW YORK CITY

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IN THE

Supreme Court of the United States

Ex Parte, THE BAKELITE CORPORATION,
Petitioner,

In the Matter

of

The Investigation of alleged unfair methods of competition and unfair acts in the importation and sale of Synthetic Phenolic Resin, Form C, and articles made wholly or in part thereof.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF PROHIBITION

And now comes the petitioner, The Bakelite Corporation, a corporation organized and existing under the laws of the State of Delaware, by Albert MacC. Barnes, Jr., its attorney, and it moves for leave to file the petition hereto annexed for a writ of prohibition, and it further moves that a rule be entered and issued directing the Presiding Judge and the Associate Judges of the United States Court of Customs Appeals to show cause why a writ of prohibition should not issue against them, in accordance with the prayer of the said petition; and why said petitioner should not have such other and further relief in the premises as may be just and meet.

ALBERT MACC. BARNES, JR.,
Attorney for Petitioner,
Office and P. O. Address,
No. 2 Rector Street,
New York, N. Y.

Petition for Writ of Prohibition

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now The Bakelite Corporation, a corporation organized and existing under the laws of the State of Delaware and gives this Honorable Court to understand and be informed:

That on the 16th day of December, 1925, your petitioner, having its principal place of business in the City of New York, and certain of its subsidiaries and consumers, filed a complaint with the United States Tariff Commission complaining of certain unfair methods of competition and unfair acts in the importation of articles into the United States tending to injure their business of manufacturing and selling articles composed of Synthetic Phenolic Resin.

The complaint was based upon the provisions of Section 316 of the Tariff Act of September 21, 1922; 42 Stat. L. 858; U. S. C. Title 19, Par. 176.

Such Section reads as follows:

> (a) That unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States, are hereby declared unlawful and when found by the President to exist shall be dealt with, in addition to any other provisions of law, as hereinafter provided.
>
> (b) That to assist the President in making any decisions under this Section the United States Tariff Commission is hereby authorized to investigate any

alleged violation hereof on complaint under oath or upon its initiative.

(c) That the commission shall make such investigation under and in accordance with such rules as it may promulgate and give such notice and afford such hearing, and when deemed proper by the commission such rehearing with opportunity to offer evidence, oral or written, as it may deem sufficient for a full presentation of the facts involved in such investigation; that the testimony in every such investigation shall be reduced to writing, and a transcript thereof with the findings and recommendations of the commission shall be the official record of the proceedings and findings in the case, and in any case where the findings in such investigation show a violation of this section, a copy of the findings shall be promptly mailed or delivered to the importer or consignee of such articles; that such findings, if supported by evidence shall be conclusive, except that a rehearing may be granted by the commission, and except that, within such time after said findings are made and in such manner as appeals may be taken from decisions of the United States Board of General Appraisers, an appeal may be taken from said findings upon a question or questions of law only to the United States Court of Customs Appeals by the importer or consignee of such articles; that if it shall be shown to the satisfaction of said court that further evidence should be taken, and that there were reasonable grounds for the failure to adduce such evidence in the proceedings before the commission, said court may order such additional evidence to be taken before the commission in such manner and upon such terms and conditions as to the court may seem proper; that the commission may modify its findings as to the facts or make new findings by reason of additional evidence, which, if supported by the evidence, shall be conclusive as to the facts except that within such time and in such manner an appeal may be taken as aforesaid upon a question or questions of law only; that the judgment of said court shall be final, except that the same shall be subject to review by the United States Supreme Court upon certiorari

applied for within three months after such judgment of the United States Court of Customs Appeals.

(d) That the final findings of the commission shall be transmitted with the record to the President.

(e) That whenever the existence of any such unfair method or act shall be established to the satisfaction of the President he shall determine the rate of additional duty, not exceeding 50 nor less than 10 per centum of the value of such articles as defined in Section 402 of Title IV of this Act, which will offset such method or act, and which is hereby imposed upon articles imported in violation of this Act, or, in what he shall be satisfied and find are extreme cases of unfair methods or acts as aforesaid, he shall direct that such articles as he shall deem the interests of the United States shall require, imported by any person violating the provisions of this Act, shall be excluded from entry into the United States, and upon information of such action by the President, the Secretary and the Treasury shall, through the proper officers, assess such additional duties or refuse such entry; and that the decision of the President shall be conclusive.

(f) That whenever the President has reason to believe that any article is offered or sought to be offered for entry into the United States in violation of this section but has not information sufficient to satisfy him thereof, the Secretary of the Treasury shall, upon his request in writing, forbid entry thereof until such investigation as the President may deem necessary shall be completed; *Provided*, That the Secretary of the Treasury may permit entry under bond upon such conditions and penalties as he may deem adequate.

(g) That any additional duty or any refusal of entry under this section shall continue in effect until the President shall find and instruct the Secretary of the Treasury that the conditions which led to the assessment of such additional duty or refusal of entry no longer exist.

The Tariff Commission after hearing the testimony submitted by the petitioner and the testimony of the im-

porters appearing in opposition thereto, to wit: Frischer & Co., Inc., Randes Importing Company, Transatlantic Clock & Watch Company, Inc., Western Briar Pipe Company, and National Council of Importers & Traders, Inc., appearing by permission of the Tariff Commission, on May 25, 1927, made its findings to the President and recommended to the President the issuance of an embargo against the importation of merchandise composed of Synthetic Phenolic Resin as described in the findings of the Commission.

From these findings and recommendations the respondents, Frischer & Co., Inc., and others, filed an appeal to the United States Court of Customs Appeals under the provisions of sub-division (c) of Section 316, *supra*, entitled as follows:

UNITED STATES COURT OF CUSTOMS APPEALS,

SUIT No. 3009.

In the Matter

of

The Investigation of alleged unfair methods of competition and unfair acts in the importation and sale of Synthetic Phenolic Resin, Form C, and articles made wholly or in part thereof.

FRISCHER & CO., INC., RANDES IMPORTING COMPANY, TRANSATLANTIC CLOCK & WATCH COMPANY, INC., WESTERN BRIAR PIPE COMPANY, NATIONAL COUNCIL OF IMPORTERS & TRADERS, INC.,

Appellants,

BAKELITE CORPORATION, ABSE BROTHERS, EMRED ART CORPORATION, KAUFMANN BROS. & BONDY, REISS-PREMIER PIPE CO., S. M. FRANK & CO., INC., WM. DEMUTH & CO., L. & H. STERN, INC.,

Appellees.

On the 22nd day of December, 1927, your petitioner, The Bakelite Corporation, through its attorneys, moved to dismiss the appeal on the ground that the said United States Court of Customs Appeals had no jurisdiction to entertain the same. Thereafter on May 25, 1928, after the submission of briefs and oral argument, the United States Court of Customs Appeals denied said motion to dismiss and filed an opinion, a copy of which is hereto annexed, marked Exhibit "A," and also an order providing:

"Appellees' motion to dismiss said appeal for want of jurisdiction, and appellants' motion to strike out the appearance of Barnes, McKenna & Halstead for appellees having been brought on to be heard before the court and due consideration thereon having been had, it is

ORDERED that appellees' motion to dismiss be, and it is hereby overruled; it is

FURTHER ORDERED that appellants' motion to strike out the appearance of Barnes, McKenna & Halstead for appellees be, and the same is hereby overruled."

The matters in question involved in the appeal from the findings and recommendations of the Tariff Commission to the President are in the opinion held to constitute a case or controversy, and the appeal provided for in Section 316 (c) is held not to offend the provisions of Article III, Sections 1 and 2 of the Constitution of the United States.

The basis of the motion to dismiss the appeal was that Congress had no power to authorize a Federal Court to entertain an appeal of the type attempted to be provided for in Section 316 in that such an appeal is not taken in a case or controversy, that there is no judgment which is sought to be reviewed and that the findings of the Tariff Commission herein sought to be reviewed are advisory findings of fact only, that said Tariff Commission is in no sense a court nor can it issue a judgment and hence no appeal therefrom can be provided for by Congress to a Federal Court under the Constitution.

The Court of Customs Appeals in its opinion held that that court was an inferior court of the United States, created under and by virtue of the provisions of Article III of the Constitution and that the jurisdiction of said court was limited to the considerations of such cases and controversies as are provided for in Section 2 of said article, but determined that the matter as it was presented to that court was such a case or controversy.

The provisions of Section 316, *supra*, attempt to provide for a unilateral appeal, on the part of importing interests

only, to the Court of Customs Appeals on questions of law only from the findings made by the United States Tariff Commission.

The powers of the United States Court of Customs Appeals as set forth in Section 316, however, are not the usual powers granted to an appellate court to affirm, reverse or modify, but said section provides "that if it shall be shown to the satisfaction of said court that further evidence should be taken and that there were reasonable grounds for the failure to adduce such evidence in the proceedings before the Commission, said court may order such additional evidence to be taken before the Commission in such manner and upon such terms and conditions as to the court may seem proper."

From this quotation it is suggested that the powers of the Court of Customs Appeals upon such an appeal would seem to be limited to expressing its opinion upon questions of law, if any arise in the matter, and a remanding of the matter to the Tariff Commission so that "The Commission may modify its findings as to the facts or make new findings by reason of additional evidence, which if supported by the evidence, shall be conclusive as to the facts except that within such time and in such manner an appeal may be taken as aforesaid upon a question or questions of law only."

The matter here has only reached the stage that the court has determined it has jurisdiction, but has not passed upon any of the questions attempted to be raised by the assignments of error filed by the appellants in that court.

Under the provisions above quoted, if the Court of Customs Appeals, when this matter finally goes before it for determination, finds error of law, it must remand the findings of the Tariff Commission to that body directing the taking of additional testimony on the modification of its findings and such an order of the Court of Customs Appeals would be an interlocutory order in the matter and could not by any possibility be considered a "final judg-

ment" and hence no appeal therefrom to this Honorable Court could be prosecuted by your petitioners.

If the Tariff Commission thereafter under an opinion of the Court of Customs Appeals should take further testimony and make further findings, which of course might be adverse to the position taken in the findings heretofore made and the recommendations that an embargo be issued, under such circumstances under the peculiar language of Section 316 your petitioner would have no right to appeal to the Court of Customs Appeals and the determination by the Court of Customs Appeals that it had jurisdiction in the prior appeal would stand without the possibility of any review by your Honorable Court upon certiorari.

The judgment order so-called issued by that court is also an interlocutory order being made prior to a final determination of the matters attempted to be brought before the Court of Customs Appeals by the appeal of the importing interests as aforesaid.

If the construction of Section 316 above suggested is correct, no appeal can come before this Honorable Court on your petitioners' application, and the prohibitory writ herein respectfully prayed for is the only method whereby the question of the jurisdiction of the Court of Customs Appeals under the Constitution can be raised.

WHEREFORE your petitioner prays that a rule be made and issued from this Honorable Court directed to the said Presiding Judge and Associate Judges of the United States Court of Customs Appeals to show cause why a writ of prohibition should not issue to prohibit the said Presiding Judge and Associate Judges from entertaining the appeal from the findings and recommendations of the Tariff Commission aforesaid and to cancel and annul the so-called judgment order of that court wherein the motion to dismiss the appeal is denied.

ALBERT MACC. BARNES, JR.,
Attorney for Petitioner.

I have read the foregoing petition by me subscribed and the facts therein stated are true to the best of my information and belief.

ALBERT MacC. BARNES, Jr.

Subscribed and sworn to before me,
this 29th day of August, 1928.

ETHEL G. MEARES,
Notary Public,
(Seal) Bronx County.
Bronx Co. Clerk's No. 41, Register's No. 2992.
Certificate filed in New York Co.
Clerk's No. 267, Register's No. 9231.
Commission expires March 30, 1929.

BRIEF IN SUPPORT OF PETITION

Opinion of the Court Below

The only opinion in this case is that of the United States Court of Customs Appeals, reported in 16 Ct. Cust. Appls. , 53 Treasury Decisions , T. D. 42827.

Jurisdiction

The jurisdiction of this court to entertain the petition for a writ of prohibition is invoked under the inherent power of this court to grant such remedy in cases where a denial of it would leave the petitioner without any remedy to test the jurisdiction of the court below. *Ex Parte Oklahoma*, 220 U. S. 191, 55 L. Ed. 431; *Ex Parte United States*, 226 U. S. 420, 57 L. Ed. 281.

Statement

The appellants in the proceedings entitled "Frischer & Co. v. Bakelite Corporation, et al., Suit No. 3009," have appealed to the United States Court of Customs Appeals to review the findings of the United States Tariff Commission in a proceeding initiated before that body by the Bakelite Corporation for the purpose of obtaining an embargo against the importation of certain articles of Synthetic Phenolic Resin claimed to be imported into the United States in contravention of the rights of the Bakelite Corporation. The proceeding before the United States Tariff Commission was instituted under Section 316 of the Tariff Act of 1922 and the appeal to the Court of Customs Appeals if any, is based upon the rights therein given to an importer to review the findings of the Tariff Commission.

The Bakelite Corporation moved to dismiss such appeal on the ground that Congress had no power to authorize such an appeal to a Federal Court and that motion was denied by the United States Court of Customs Appeals and in effect thereby that court assumed jurisdiction of the appeal.

A writ of prohibition is requested here because it is felt that otherwise the assumption of jurisdiction by the Court of Customs Appeals in Suit No. 3009 may not be otherwise brought to the attention of this court. The procedure subsequent to a report by the Tariff Commission to the President outlined in Section 316 of the Tariff Act of 1922 is such that your petitioners here are quite likely to be precluded from any opportunity to review the decision of the United States Court of Customs Appeals. That court having held the appeal, the case will finally be submitted to that court and may under the forms therein provided be remanded to the Tariff Commission.

No right of appeal is granted to your petitioners from the findings of the Tariff Commission and therefore if such finding be adverse on such remand, your petitioner would be precluded from any opportunity of having an Appellate Court pass upon the propriety thereof.

Specification of Errors.

1. The United States Court of Customs Appeals erred in holding that it had jurisdiction to entertain the appeal from the findings of the United States Tariff Commission.

2. The United States Court of Customs Appeals erred in holding that the proceedings instituted before the United States Tariff Commission constituted a case or controversy within the meaning of Article III, Section 2, of the Constitution of the United States.

3. The United States Court of Customs Appeals erred in holding that the fact that the appeal before it consti-

tuted a case or controversy gave it jurisdiction to entertain such appeal.

4. The United States Court of Customs Appeals erred in failing to hold that the provisions of Section 316 of the Tariff Act of 1922 giving a right of appeal from the findings of the United States Tariff Commission are unconstitutional.

Summary of Argument.

The United States Court of Customs Appeals, being one of the courts created by Article III, Section 1, of the Constitution, is confined in its jurisdiction to such cases or controversies as are specified in Section 2 of the Article. The proceedings instituted in the United States Tariff Commission constituted neither a case nor a controversy within the meaning of the section, and the United States Court of Customs Appeals therefore had no jurisdiction to entertain an appeal from the findings of the Commission. That portion of Section 316 of the Tariff Act of 1922 purporting to give the right to such appeal is unconstitutional.

ARGUMENT.

POINT I.

The jurisdiction of the Supreme Court of the United States and the inferior Federal Courts is limited to cases or controversies and no appeal will lie to a Federal Court except from a judgment which finally determines a controversy.

Any finding of the United States Tariff Commission under the provisions of Section 316 of the Tariff Act of

1922 can be considered as nothing but a finding of fact upon which The President of the United States may determine whether or not unfair methods of competition and unfair acts in the importation of merchandise are found to exist.

No provision is made for the issuance of a judgment by the Tariff Commission and standing by themselves, such findings have absolutely no vitality. No order based thereon has been issued by The President of the United States.

This court has lately passed upon a case which your petitioners deem to be conclusive of the question of the jurisdiction of the inferior courts of the United States under Article III, Section 2 of the Constitution.

See *Postum Cereal Company, Inc.* v *California Fig Nut Company*, 272 U. S. 693, 71 L. Ed. 478. That was a case involving the registration of a trade-mark wherein finally the Commissioner of Patents on an appeal from the Examiner of Interferences in the Patent Office held that the registration of a trade-mark should not be cancelled.

Thereupon an appeal was taken to the Court of Appeals of the District of Columbia which court held that there was no jurisdiction given to that court to hear such appeals and the same was accordingly dismissed. The Court of Appeals of the District of Columbia thereupon allowed an appeal to the Supreme Court of the United States on their judgment dismissing the appeal. The appellant based his appeal upon the fact that any final judgment of the Court of Appeals might be re-examined in the Supreme Court upon error or appeal in cases in which the construction of any law of the United States is drawn in question. The Supreme Court however, refused to entertain the question at all upon the ground that there was no jurisdiction in that court to entertain the same upon the ground that the judgment of the District Court of Appeals was not a judicial judgment.

The Learned Chief Justice writing the opinion says:

"The decision of the Court of Appeals under Section 9 of the Act of 1905 is not a judicial judgment. It is a mere administrative decision. It is merely an instruction to the Commissioner of Patents by a court which is made part of the machinery of the Patent Office for administrative purposes. In the exercise of such function it does not enter a judgment binding parties in a case as the term 'case' is used in the third article of the Constitution. Section 9 of the Trade-Mark Act of 1905, applies to the appeal, taken under it the same rules which under Sec. 4914, Rev. Stat. Comp. Stat. Sec. 9459, 7 Fed. Stat. Anno. 2nd Ed. P. 202, apply to an appeal taken from the decision of the Commissioner of Patents in patent proceedings. Butterworth v. United States, 112 U. S. 50, 60; 28 L. Ed. 656, 659; 5 Sup. Ct. Rep. 25; Gaines v. Knecht, 27 App. D. C. 530, 532; E. C. Atkins & Co. v. Moore, 212 U. S. 285, 291; 53 L. Ed. 515, 517; 29 Sup. Ct. Rep. 390. Neither the opinion nor decision of the Court of Appeals under Sec. 4914, Rev. Stat. or Sec. 9 of the Act of 1920, precludes any person interested from having the right to contest the validity of such patent or trade-mark in any court where it may be called in question. This result prevents an appeal to this court which can only review judicial judgments. This court has so decided in Frasch v. Moore, 211 U. S. 1; 53 L. Ed. 65; 29 Sup. Ct. Rep. 6, in an appeal as to patent proceedings, and in E. C. Atkins & Co. v. Moore, 212 U. S. 285; 53 L. Ed. 515; 29 Sup. Ct. Rep. 390, as to appeals in trade-mark proceedings. This was the ratio dicidendi of Baldwin Co. v. R. S. Howard Co., 256 U. S. 35; 65 L. Ed. 816; 41 Sup. Ct. Rep. 405, already referred to, where both appeal and certiorari were denied in a similar trade-mark proceeding."

Further discussing the jurisdiction of the Supreme Court in a constitutional sense and administrative decisions of the courts of the District of Columbia (which latter jurisdiction Congress has power to confer), the court says:

"The distinction between the jurisdiction of this court which is confined to the hearing and decision of cases in the constitutional sense and that of administrative action and decision, power for which may be conferred upon courts of the District is shown in the case of Keller v. Potomac Electric Power Co., 261 U. S. 428, 440, 442, 443; 67 L. Ed. 731, 735, 736; 43 Sup. Ct. Rep. 445. There it is pointed out that while Congress in its constitutional exercise of exclusive legislation over the district may clothe the courts of the district not only with the jurisdiction and powers of the Federal Courts in the several states, but also with such authority as a state might confer on her courts, Prentis v. Atlantic Coast Line Co., 211 U. S. 210, 225, 226; 53 L. Ed. 150, 158, 159; 29 Sup. Ct. Rep. 67, and so may vest courts of the district with administrative or legislative functions which are not properly judicial, *it may not do so with this court or any federal court established under Article 3 of the Constitution.* Of the jurisdiction of this court, we said at page 444:

'Such legislative or administrative jurisdiction, it is well settled, can not be conferred on this court either directly or by appeal. The latest and fullest authority upon this point is to be found in the opinion of Mr. Justice Day, speaking for the court in Muskrat v. United States, 219 U. S. 346; 55 L. Ed. 246; 31 Sup. Ct. Rep. 250. The principle there recognized and enforced on reason and authority is that the jurisdiction of this court and *of the inferior courts of the United States*, ordained and established by Congress under and by virtue of the third article of the Constitution is limited to cases and controversies in such form that the judicial power is capable of acting on them; and does not extend to an issue of constitutional law framed by Congress for the purpose of invoking the advice of this court without real parties or a real case, or to administrative or legislative issues or controversies.' See also Liberty Warehouse Co. v. Grannis, 273 U. S. 70, post 541; 47 Sup. Ct. Rep. 282.

With this limitation upon our powers, it is not difficult to reach a conclusion in the present case. We should have had no power to review the action of the

District Court if it had heard the appeal and taken administrative jurisdiction and by the same token have now no power to review its action in refusing such jurisdiction." (Italics ours.)

The court refers further to its decision in *Liberty Warehouse Company* v. *Grannis*, 273 U. S. 70; 71 L. Ed. 541, where the court said:

"The question whether the District Court has jurisdiction to entertain such a petition for a declaration of rights admits of but one answer under the prior decisions of this court.

We need not review these at length. It suffices to say that in the light of the decisions in Muskrat v. United States, 219 U. S. 346, 357; 55 L. Ed. 246, 250; 31 Sup. Ct. Rep. 250; Fairchild v. Hughes, 258 U. S. 126, 129; 66 L. Ed. 499, 504; 42 Sup. Ct. Rep. 274; Texas v. Interstate Commerce Commission, 258 U. S. 158, 162; 66 L. Ed. 531, 537; 42 Sup. Ct. Rep. 261; Keller v. Potomac Electric Co., 261 U. S. 428, 444; 67 L. Ed. 731, 736; 43 Sup. Ct. Rep. 445; Massachusetts v. Mellon, 262 U. S. 447, 488; 67 L. Ed. 1078, 1085; 43 Sup. Ct. Rep. 597; New Jersey v. Sargent, 269 U. S. 328, 330; 70 L. Ed. 289, 291; 46 Sup. Ct. Rep. 122; and Postum Cereal Co. v. California Fig Nut Co., 272 U. S. 693, ante, 478; 47 Sup. Ct. Rep. 284, in which the principles stated in earlier cases are considered and applied—it is not open to question that the judicial power vested by Article 3 of the Constitution in this court and the inferior courts of the United States established by Congress thereunder, extends only to 'cases' and 'controversies' in which the claims of litigants are brought before them for determination by such regular proceedings as are established for the protection and enforcement of rights, or the prevention, redress, or punishment of wrongs; and that their jurisdiction is limited to cases and controversies presented in such form, with adverse litigants, that the judicial power is capable of acting upon them, and pronouncing and carrying into effect a judgment between the parties, and does not extend to the determination of abstract questions or issues framed for

the purpose of invoking the advice of the court without real parties or a real case."

In *David Muskrat* v. *United States*, 219 U. S. 346; 55 L. Ed. 246, Mr. Justice Day goes very fully into the decided cases in reference to the jurisdiction of the Supreme Court and also the inferior Federal Courts established under the Constitution. Thus (p. 249):

> "The subject underwent a complete examination in the case of Gordon v. United States, reported in an appendix to 117 U. S. 697, in which the opinion of Mr. Chief Justice Taney, prepared by him and placed in the hands of the clerk, is published in full. It is said to have been his judicial utterance, and the whole subject of the nature and extent of the judicial power conferred by the Constitution is treated with great learning and fullness. In that case an Act of Congress was held invalid which undertook to confer jurisdiction upon the courts of claims, and thence by appeal to this court, the judgment, however, not to be paid until an appropriation had been estimated therefore by the Secretary of the Treasury; and, as was said by the chief justice, the result was that neither court could enforce its judgment by any process, and whether it was to be paid or not depended on the future action of the Secretary of the Treasury and of Congress. 'The Supreme Court,' says the Chief Justice, 'does not owe its existence or its powers to the legislative department of the government. It is created by the Constitution and represents one of the three great divisions of power in the government of the United States, to each of which the Constitution has assigned its appropriate duties and powers, and made each independent of the other in performing its appropriate functions. The power conferred on this court is exclusively judicial, and it cannot be required or authorized to exercise any other.
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> * * * * * * * * *
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> 'These cardinal principles of free government had not only been long established in England, but also in the United States from the time of their earliest col-

onization, and guided the American people in framing and adopting the present Constitution. And it is the duty of this court to maintain it unimpaired as far as it may have the power. And while it executes firmly all the judicial powers entrusted to it, the court will carefully abstain from exercising any power that is not strictly judicial in its character, and which is not clearly confided to it by the Constitution.'

"At the last term of the court, in the case of Baltimore & O. R. Co. v. Interstate Commerce Commission, 215 U. S. 216, 54 L. Ed. 164, 30 Sup. Ct. Rep. 86, this court declined to take jurisdiction of a case which undertook to extend its appellate power to the consideration of a case in which there was no judgment in the court below. In that case former cases were reviewed by Mr. Chief Justice Fuller, who spoke for the court, and the requirement that this court adhere strictly to the jurisdiction, original and appellate, conferred upon it by the Constitution, was emphasized and enforced. It is therefore apparent that from its earliest history this court has consistently declined to exercise any powers other than those which are strictly judicial in their nature.

"It therefore becomes necessary to inquire what is meant by the judicial power thus conferred by the Constitution upon this court, and, with the aid of appropriate legislation, upon the inferior courts of the United States. 'Judicial power', says Mr. Justice Miller, in his work on the Constitution, 'is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision'. Miller, Const. 314.

"As we have already seen, by the express terms of the Constitution, the exercise of the judicial power is limited to 'cases' and 'controversies'. Beyond this it does not extend, and unless it is asserted in a case or controversy within the meaning of the Constitution, the power to exercise it is nowhere conferred.

"What, then, does the Constitution mean in conferring this judicial power with the right to determine 'cases' and 'controversies'. A 'case' was defined by Mr. Chief Justice Marshall as early as the leading

case of Mabury v. Madison, 1 Cranch 137, 2 L. Ed. 60, to be a suit instituted according to the regular course of judicial procedure. And what more, if anything, is meant in the use of the term 'controversy'? That question was dealt with by Mr. Justice Field at the circuit, in the case of Re Pacific R. Commission, 32 Fed. 241, 255. Of these terms that learned justice said:

'The judicial article of the Constitution mentions cases and controversies. The term "controversies", if distinguishable at all from "cases", is so in that it is less comprehensive than the latter, and includes only suits of a civil nature. Chisholm v. Georgia, 2 Dall. 431, 432, 1 L. Ed. 445, 446, 1 Tucker's Bl. Com. App. 420, 421. By cases and controversies are intended the claims of litigants brought before the court for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the Constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties, whose contentions are submitted to the court for adjudication.' "

The purview of the attempted appeal given to importers is enough to show that it does not involve a final decision in a case or controversy. The right is restricted to questions of law only, but the only power of the appellate court as attempted to be given is "if it shall be known to the satisfaction of said court that *further evidence should be taken*, and *that there were reasonable grounds for the failure to adduce such evidence* under proceedings before the Commission, said court may order such additional evidence to be taken before the Commission * * *" (italics ours). No power to affirm, reverse or modify the findings themselves is given to the court, and in fact no authority is given to the court except to remand for further evidence.

Certainly the Supreme Court could not and would not

take jurisdiction under such circumstances, and as certainly the Court of Customs Appeals has no power to consider the appeal.

It is also to be noticed that no right of appeal is given to the petitioners from any findings of the United States Tariff Commission. Could a tentative determination from which only one party could even attempt a review be considered a final judgment or order in a case or controversy? The denial or jurisdiction of such an appeal leaves the parties where they ought to be with equal and only equal rights before the Tariff Commission.

POINT II.

The United States Court of Customs Appeals is an inferior United States Court.

Under the above cited cases, it would seem only to be necessary to determine whether the Court of Customs Appeals is a Federal Court.

Article III, Section 1 of the Constitution reads:

> "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office."

Article III, Section 2, provides:

> "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to

> controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens and subjects."

It is to be noted that in the decision of the Court of Customs Appeals it holds as was asserted by your peitioners and conceded both by the appellants in the Court of Customs Appeals, and the Honorable Charles B. Lawrence, who is the Assistant Attorney General of the United States in charge of Customs Matters, appearing as amicus curiæ at the request of the court, that the United States Court of Customs Appeals is an inferior court of the United States established under Article III of the Constitution.

POINT III.

The question to be determined is not whether the proceedings constitute a "case" or "controversy" in the Court of Customs Appeals, but whether or not the proceedings culminating in the findings of the Tariff Commission constitute a "case" or "controversy."

In its opinion, the Court of Customs Appeals holds itself to have jurisdiction of the matters in question because of the fact that after they have assumed jurisdiction they will enter a judgment which will have the effect of finally settling the "case" or "controversy."

The learned court says: "The question before us is: When the case reaches us is it a 'case' or a 'controversy'? It is not a question as to what it was in the tribunal below, but what it is when it reaches us."

The Court of Customs Appeals was ordained and established by Congress in an act to ratify, revise and amend

the laws relating to the judiciary, Chapter 8 of the Judicial Code, Sections 188 to 199 inclusive, 36 Stat. L. 1143-1146. Section 194 provides that the court shall be a court of record, Section 195 was amended by the Act of August 22, 1914. It reads:

> "Sec. 195. (FINAL DECISIONS OF BOARD OF GENERAL APPRAISERS TO BE REVIEWED ONLY BY CUSTOMS COURT OF APPEALS. FINALITY OF DECISIONS OF CUSTOMS COURT.)
>
> That the Court of Customs Appeals established by this chapter shall exercise exclusive appellate jurisdiction to review by appeal, as herein provided, final decisions by a board of general appraisers in all cases as to the construction of the law and the facts respecting the classification of merchandise and the rate of duty imposed thereon under such classifications, and the fees and charges connected therewith, and all appealable questions as to the jurisdiction of said board, and all appealable questions as to the laws and regulations governing the collection of the customs revenues; and the judgments and decrees of said Court of Customs Appeals shall be final in all such cases. Provided * * *."

It will be noted that the jurisdiction of the Court of Customs Appeals is distinctly limited to that of an appellate court. Nothing in the statute gives to that court either expressly or by necessary implication any original jurisdiction.

As such therefore, it is limited to appeals in cases or controversies which have become such prior to the time that they reach that court.

Having no original jurisdiction it cannot start a case or controversy. A case or controversy must have originated in some other judicial tribunal and a judgment issued therein in order that the Court of Customs Appeals may assume jurisdiction thereof.

This is clearly stated in *Baltimore & Ohio* v. *Interstate Commerce Commission*, 215 U. S. 216, 54 L. Ed. 164, 30

Sup. Ct. Rep. 86, in which Mr. Chief Justice Fuller in passing upon a case where a review by certificate was asked of a question raised in the Circuit Courts held that the Supreme Court had no power to pass upon the question raised in the absence of a final judgment. The court says:

"Ordinarily in the Federal Courts, in the absence of express statutory authority, no appeal can be taken or writ of error brought *except from a final decree or to a final judgment.* McLish v. Roff, 141 U. S., 661, 665, 35 L. Ed. 893, 894, 12 Sup. Ct. Rep. 118; Forgay v. Conrad, 6 How. 201, 205, 12 L. Ed. 404, 406. There is no final judgment or decree in this case, nor any judicial determination from which an appeal would lie. The Alicia, 7 Wall. 571, 19 L. Ed. 84, is in point. In that case it appeared that, on the 9th day of January, 1863, a decree of condemnation had been entered in the District Court against the Alicia and her cargo for violation of the blockade. From this decree an appeal was allowed and taken to the Circuit Court; and on the 18th of May, 1867, an order was made in that court on the application of the parties in interest—there being at this time, in the Circuit Court, no order, judgment, or decree in the case—for the transfer of the cause to this court under the 13th section of the act of June 30, 1864 (13 Stat. at L. 311, chap. 174), which enacted that prize causes depending in the Circuit Court might be so transferred. This court held that the cause was removed to the Circuit Court by the appeal from the decree of the District Court, and that that decree was vacated by the appeal, and that the Circuit Court acquired full jurisdiction of the cause, and was fully authorized to proceed to final hearing and decree. And Chief Justice Chase said: 'Nor can it be doubted that, under the Constitution, this court can exercise, in prize causes, appellate jurisdiction only. *An appellate jurisdiction necessarily implies some judicial determination—some judgment, decree, or order of an inferior tribunal, from which an appeal has been taken.* But in this case there had been no such order, judgment, or decree in the Circuit Court; and there was no subsisting decree in the District

> Court, from which an appeal could be taken. We are obliged to conclude that, in the provision for transfer, an attempt was inadvertently made to give to this court a jurisdiction withheld by the Constitution, and, consequently, that the order of transfer was without effect. The cause is still pending in the Circuit Court." (Italics ours.)

The United States Court of Customs Appeals in its opinion refers to several cases which were held to constitute cases or controversies within the meaning of the constitutional provision. It is to be noted, however, that each of these cases were initiated in a court of original jurisdiction.

Thus in *Tutun* v. *United States*, 270 U. S. 568, 70 L. Ed. 738 the question involved was as to whether or not *an order of a District Court* granting or denying a petition for naturalization was a final decision and whether or not such a proceeding was a "case" within the meaning of Article III of the Constitution. Properly to consider this case in relation to the case now under consideration, a comparison must be made between the judgment of the District Court granting or denying a petition for naturalization and the findings of the Tariff Commission thereafter to be referred to the President under Section 316 of the Tariff Act of 1922. The mere statement of the situation in each of these cases is sufficient to show that the decision in the Tutun case is no authority for holding that the Court of Customs Appeals has jurisdiction to entertain the appeal here.

In *Tutun* v. *United States*, *supra*, this court stated that "the United States may create rights in individuals against itself and provide only an administrative remedy. It may provide a legal remedy but make resort to the courts valuable only after all administrative remedies have been exhausted. Whenever the law provides a remedy enforceable in the courts according to the regular course of legal procedure and that remedy is pursued, there arise a case

within the meaning of the Constitution, whether the subject of the litigation be property or statutes." The proceedings before the United States Tariff Commission under Section 316 of the Tariff Act of 1922 are purely administrative. They are designated as investigations to assist the President in making decisions. In Sections 316, there is no obligation placed upon the President to follow any findings of the Tariff Commission. Their findings do not become binding on any one nor are they in any sense a final judgment or decree because that function of rendering the final judgment or decree is left to the President. This is totally different from the situation arising in the case of a decree by a District Court granting a petition for citizenship.

The Tariff Commission is not a judicial tribunal. If the matter here in question had arisen in any form before a judicial tribunal of the United States from which appeals are properly prosecuted to the Court of Customs Appeals, the decision of the court in the Tuton case would have been applicable to the situation here.

The findings of fact and the recommendations of the Tariff Commission to the President are advisory only and as was stated by this court in *Fidelity National Bank & Trust Company* v. *Swope*, 274 U. S. 123, 71 L. Ed. 959, the application of such an advisory function does not make of the matter a case or controversy under the Constitution, citing *Tregea* v. *Modesto Irrigation District*, 164 U. S. 179; 41 L. Ed. 395; 17 Sup. Ct. Rep. 52, and *Liberty Warehouse Company* v. *Grannis*, 273 U. S. 70; 47 Sup. Ct. Rep. 282. The case of Fidelity National Bank & Trust Company v. Swope, rests on a basis entirely different from that in the present proceeding. It was there held that the judicial power "operates to determine judicially the legal limits of the benefit district and to define rights of the parties in lands specifically described in the pleadings." There is no attempt on the part of the Tariff Commission nor has it any authority to judicially determine any question. Its

power is limited to findings of fact and recommendations to the President upon which no final decision or decree or proclamation or judgment may ever be rendered. It is purely advisory in nature and even the attempt to create a right of appeal to the United States Court of Customs Appeals is nothing more than an attempt on the part of the legislative department to force on a Federal Court the function of advising an administrative body so that it in turn may advise the executive.

The Court of Customs Appeals in its opinion states: "The parties have had their day in court where a definite legal issue involving a valuable right is finally and judicially adjudicated." Certainly at this time this quotation is entirely inapplicable to the situation here. The parties have had no day in court because at the present time no court proceedings of any nature except under the assumed jurisdiction of the Court of Customs Appeals have been had. To state that a person has had a day in court because they are granted a questionable right of appeal from a finding made by a purely administrative body refutes itself.

In all of the cases cited by the learned court in its opinion, the cases had initiated in a court having original and not appellate jurisdiction.

In *Interstate Commerce Commission* v. *W. G. Brinson*, 154 U. S. 447, 38 L. Ed. 1047, the matter involved was the review of a judgment dismissing a petition filed in the Circuit Court of the United States by the Interstate Commerce Commission under the provisions of the Act of Congress entitled "An act to regulate commerce." The Supreme Court held, reversing the decision of the court below, that there was a case or controversy involved.

This case involved the power of Congress to direct the courts to use their authority in aid of inquiries before the Interstate Commerce Commission. It involved no ques-

tion of an appeal from a finding of an administrative body like the matter under consideration.

In *Den* v. *The Hoboken Land & Improvement Co.*, 59 U. S. 272, 15 L. Ed. 372, a question was similarly presented to a court of original jurisdiction and the decision of the Supreme Court held that there was a case or controversy involved. None of these or any of the other cases cited in the learned opinion of the Court of Customs Appeals is an authority for the proposition that a case or controversy can first initiate in a purely appellate court. The difference between cases involving the Federal Trade Commission and the Interstate Commerce Commission and the matter under consideration is apparent. There is no right of appeal granted to any court from the findings of any of the Federal Commissions so far as we are aware.

There are proceedings whereby the original jurisdiction of a Federal Court may be invoked to pass upon the propriety of certain of the orders of such commissions, either where the Government has asked for the aid of the courts in enforcing the orders of the commissions or where the interested parties have asked that said orders be vacated or set aside.

Undoubtedly such matters are cases or controversies within the meaning of Article III of the Constitution and have been so held by this Court, but there the orders of the Commission have a vitality in themselves and it is the enforcement thereof which comes before the Court for determination. Here the findings of the Tariff Commission not only have no vitality but even without any review thereof may never result in action by the Chief Executive.

It is respectfully urged that:

1. The Court of Customs Appeals is an inferior Federal Court established under Article III of the Constitution having exclusively appellate jurisdiction.

2. That there is no case or controversy pending within the meaning of Article III, Section 2, of the Constitution over which such appellate court can assume jurisdiction.

3. That a writ of prohibition should issue as asked for in the petition.

Respectfully submitted,

ALBERT MacC. BARNES, JR.,
Attorney for Petitioner.

Samuel M. Richardson,

EXHIBIT "A".

May 25, 1928.

JURISDICTION OF APPEALS FROM THE U. S. TARIFF COMMISSION—CONSTITUTIONALITY

The United States Court of Customs Appeals

OCTOBER TERM, 1927

In the matter of the investigation of alleged unfair methods of competition and unfair acts in the importation and sale of Synthetic Phenolic Resin, Form C, and articles made wholly or in part thereof.

FRISCHER & CO., INC., RANDES IMPORTING COMPANY, TRANSATLANTIC CLOCK & WATCH COMPANY, INC., WESTERN BRIAR PIPE COMPANY, NATIONAL COUNCIL OF IMPORTERS & TRADERS, INC., APPELLANTS.

Suit No. 3009. Calendar No. 134

BLAND, *Judge*, delivered the opinion of the court:

In the above entitled matter, the Bakelite Corporation, et al., styling themselves "Appellees", moved for an order dismissing the above entitled appeal upon the ground that the court has no jurisdiction to entertain the same.

On the 16th day of December, 1925, the Bakelite Corporation, having its principal place of business in the City of New York, and certain of its subsidiaries and consumers

filed a complaint with the United States Tariff Commission, complaining of certain unfair methods of competition and unfair acts tending to injure their business of manufacturing and selling articles composed of synthetic phenolic resin, to which had been given the name "Bakelite" after the name of its alleged inventor, Dr. Leo Bakeland. The complaint proceeded upon the theory that the faceted beads and other articles made of synthetic phenolic resin imported were being imported in violation of certain patent rights, possessed by the Bakelite Corporation. The complaint was made pursuant to the provisions of Section 316, Subdivision (b) of the Tariff Act of September 21, 1922.

The Tariff Commission thereupon made a report to the President that it had investigated the complaint, and made and submitted findings to the effect that there was *prima facie* reason to believe that Section 316 of the Tariff Act in question was being violated, and recommended that the Treasury Department forbid the entry of such articles until such investigation as the President might deem necessary might be completed, and recommended that the President request the Secretary of the Treasury to forbid such entry. Acting upon such report, the President did direct the Secretary of the Treasury to issue an embargo against the commodity.

The Commission thereupon published a notice directing that all persons interested in the proceedings show cause why the prayer for relief sought in the complaint should not be granted.

Frischer & Co., Inc., et al., the respondents, known as appellants in this action, appeared and filed a verified answer denying the complaint, setting up that the Bakelite Corporation did not operate the business efficiently or economically; that the patents upon which they relied were invalid; that there was no infringement of the patents; that the violation of a patent law was not an unfair method of competition, and other claims.

The Bakelite Corporation appeared before the Commission by counsel and lengthy hearings were had, and on the 25th day of May, 1927, the Commission made its findings and recommendations, in which it expressly found that the provisions of the statute were broad enough to invest it with jurisdiction to declare that the infringement of the patent rights was an unfair method within the meaning of the statute. Certain other findings and recommendations were made, not material here.

From these findings and recommendations an appeal was taken to this court under subdivision (c) of Section 316, *supra*, upon thirty-five assignments of error.

Frischer & Co., Inc., et al., at the time of the argument of the motion to dismiss, made what they style a cross-motion to strike out the appearance of Barnes, McKenna & Halstead as attorneys for the Bakelite Corporation, on the ground that the same is unauthorized by statute, which latter motion the court now overrules.

Before setting out the reasons assigned by the Bakelite Corporation, et al., why this court was without jurisdiction to hear the appeal, we deem it proper to set out in full the parts of the Tariff Act of 1922 under which the actions of the Tariff Commission and the appeal to this court were taken:

> Sec. 316. (a) That unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States, are hereby declared unlawful, and when found by the President to exist shall be dealt with, in addition to any other provisions of law, as hereinafter provided.
>
> (b) That to assist the President in making any decisions under this section the United States Tariff

Commission is hereby authorized to investigate any alleged violation hereof on complaint under oath or upon its initiative.

(c) That the commission shall make such investigation under and in accordance with such rules as it may promulgate and give such notice and afford such hearing, and when deemed proper by the commission such rehearing with opportunity to offer evidence, oral or written, as it may deem sufficient for a full presentation of the facts involved in such investigation; that the testimony in every such investigation shall be reduced to writing, and a transcript thereof with the findings and recommendations of the commission shall be the official record of the proceedings and findings in the case, and in any case where the findings in such investigation show a violation of this section, a copy of the findings shall be promptly mailed or delivered to the importer or consignee of such articles; that such findings, if supported by evidence, shall be conclusive, except that a rehearing may be granted by the commission, and except that, within such time after said findings are made and in such manner as appeals may be taken from decisions of the United States Board of General Appraisers, an appeal may be taken from said findings upon a question or questions of law only to the United States Court of Customs Appeals by the importer or consignee of such articles; that if it shall be shown to the satisfaction of said court that further evidence should be taken, and that there were reasonable grounds for the failure to adduce such evidence in the proceedings before the commission, said court may order such additional evidence to be taken before the commission in such manner and upon such terms and conditions as to the court may seem proper; that the commission may modify its findings as to the facts or make new findings by reason of additional evidence, which, if supported by the evidence, shall be conclusive as to the facts except that within such time and in such manner an appeal may be taken as aforesaid upon a question or questions of law only; that the judgment of said court shall be final, except that the same shall be subject to review by the United States Supreme Court upon certiorari

applied for within three months after such judgment of the United States Court of Customs Appeals.

(d) That the final findings of the commission shall be transmitted with the record to the President.

(e) That whenever the existence of any such unfair method or act shall be established to the satisfaction of the President he shall determine the rate of additional duty, not exceeding 50 nor less than 10 per centum of the value of such articles as defined in Section 402 of Title IV of this Act, which will offset such method or act, and which is hereby imposed upon articles imported in violation of this Act, or, in what he shall be satisfied and find are extreme cases of unfair methods or acts as aforesaid, he shall direct that such articles as he shall deem the interests of the United States shall require, imported by any person violating the provisions of this Act, shall be excluded from entry into the United States, and upon information of such action by the President, the Secretary of the Treasury shall, through the proper officers, assess such additional duties or refuse such entry; and that the decision of the President shall be conclusive.

(f) That whenever the President has reason to believe that any article is offered or sought to be offered for entry into the United States in violation of this section but has not information sufficient to satisfy him thereof, the Secretary of the Treasury shall, upon his request in writing, forbid entry thereof until such investigation as the President may deem necessary shall be completed: *Provided*, That the Secretary of the Treasury may permit entry under bond upon such conditions and penalties as he may deem adequate.

(g) That any additional duty or any refusal of entry under this section shall continue in effect until the President shall find and instruct the Secretary of the Treasury that the conditions which led to the assessment of such additional duty or refusal of entry no longer exist.

Briefly stated, the position of the Bakelite Corporation, et al., is that the matter before the court now is not a "case" or a "controversy" within the meaning of Section 2 of Article III of the Constitution of the United States

and that the United States Court of Customs Appeals, being an inferior court, created by Congress, under and by virtue of the authority of Section 1 of Article III of the Constitution, can only hear "cases" and "controversies" such as are provided for in said Section 2.

The pertinent portions of the Constitution in the determination of the question before us are as follows:

ARTICLE III.

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

* * * * * * * * *

ARTICLE 1.

"Section 8. The Congress shall have Power * * *

* * * * * * * * *

"To constitute Tribunals inferior to the supreme Court;

* * * * * * * * *

Both sides to the controversy, including *amicus curiae*, concede that the United States Court of Customs Appeals is an inferior court, created under and by virtue of the provisions of said Article III of the Constitution, and that the jurisdiction of this court is limited to the consideration of such "cases" and "controversies" as are provided for in Section 2 of said article. The difference of opinion between the parties seems to be entirely confined to the question as to whether the matter before us is or is not such a "case" or "controversy."

It is at once apparent that if this court is not limited in its jurisdiction to the class of "cases" and "controversies" referred to in Article III, then there is no reason why it may not properly consider administrative appeals or appeals involving almost any kind of disputed question, when so directed by Congress. We think it proper, therefore, to attempt to definitely determine under what constitutional grant of power Congress was acting when it created this court, before proceeding to the determination of the question as to whether the appeal to this court submits to it for decision such a "case" or "controversy."

When Congress creates a court, obviously, it must do so by virtue of some powers conferred upon it by the Constitution. We think Article 1, section 8, where it provides that "the Congress shall have power * * * to constitute Tribunals inferior to the supreme Court," grants no further court-creating powers than those provided for in Article III. See Story on the *Constitution*, 5th Ed. Vol. 2, Sec. 1579; and Walker's *American Law*, 6th Ed., p. 108; and Watson on the *Constitution*, Vol. 2, p. 1065.

It may be argued that Congress has the power to create certain courts or judicial tribunals by virtue of certain implied grants of the Constitution aside from any powers expressly conferred by Article III; that is to say, that the right to establish complete claims-settling machinery, including that of a judicial tribunal, goes with the grant

of the right expressly granted to pay debts, and that in the same manner Congress has the implied power to create an appellate judicial tribunal to adjudicate matters arising out of the collection of income taxes and out of the collection of customs duties, etc. Regardless of what may be said and what has been said about the lack of implied powers where the Constitution speaks definitely in granting powers, and the lack of power in Congress to confer any part of the judicial powers of the United States upon any tribunal other than an inferior court, we do not regard it as necessary to the decision of this issue to pass upon the merit or lack of merit of such contentions. See *American Insurance Co.* v. *Canter*, 1 Pet. 511-545.

As we view it, this court either was or was not created, on August 5, 1909, under and by virtue of the power granted to Congress in Article I, section 8, and Article III, *supra*. If it was created under and by virtue of such power, we think it follows, beyond plausible controversy, that it is limited in its jurisdiction to such "cases" and "controversies" as are specified in section 2 of Article III. To this effect are the latest and most apt pronouncements of the Supreme Court and which may be found in *Muskrat* v. *United States*, 219 U. S. 346; *Postum Cereal Company* v. *California Fig Nut Company*, 272 U. S. 693; and *Liberty Warehouse Company et al.* v. *Grannis*, 273 U. S. 70.

While there has been considerable said in some of the decisions of the Supreme Court, in connection with matters somewhat unrelated to the issues at hand, relative to a distinction existing between the limitation on the jurisdiction of the Supreme Court under Article III and the limiting effect of such article on the jurisdiction of inferior courts (*Gordon* v. *United States*, 117 U. S. 697) and while suggestions have been made indicating that there may be "inferior" courts other than those in contemplation in Article III, we think that the decisions of the Supreme Court have definitely settled the proposition that

the limitations of Article III on jurisdiction, as well as the provisions for salary and tenure of office, apply with as much force to an inferior court, created under Article III, as to the Supreme Court. *Liberty Warehouse Company et al. v. Grannis, supra; Keller et al. v. Potomac Electric Power Co. et al.*, 261 U. S. 428.

In order to determine its jurisdiction, therefore, any United States court called upon to construe the laws of the United States, such as the one at bar, must necessarily first determine under what constitutional power it was created, in order to determine whether or not it is subject to the limitations as to jurisdiction prescribed by the Constitution. In this connection the Court must inquire what *was* done, and not what *may be* done. In doing so resort may be had, not only to the context of the act of creation, but to the legislative history, committee reports, and other similar legislation involving the creation of courts and tribunals. After a careful examination into all of these facts, many considerations bring us to the conclusion that this court was created under and by virtue of the authority of Article III of the Constitution, and by no other authority, and some of which considerations we deem it advisable to enumerate.

The pertinent portions of section 29 of the tariff act of 1909 (H. R. 1438), in which act this court was brought into existence, are too long for quotation here. The act itself is referred to, hereinafter, in preference to the Codes of 1911 and 1926, since the Codes have slightly changed some of the original expressions.

It will be observed that in the creation and establishment of this court no jurisdiction was given to it except in "cases". In its original creation it was not within the contemplation of its creators to confer upon it jurisdiction to try administrative questions or matters not embraced within the terms of section 2 of Article III. Every case given to it arises under "the laws of the United States".

It will be noted further that it was styled the "United States Court of Customs Appeals," and that its members were designated as "a presiding judge and four associate judges"; that it should be "a court of record, with jurisdiction as hereinafter established and limited"; that its "judgment or decrees * * * shall be final".

Its jurisdiction was carved out of the jurisdiction of the circuit courts and circuit courts of appeals, and it not only took the jurisdiction formerly entertained solely by the circuit courts and circuit courts of appeals, but its jurisdiction was made final, even denying litigants the right of appeal to the Supreme Court. The law was, in 1914, amended to provide a very limited right of appeal to the Supreme Court. The judges were to receive compensation of $10,000. The act provided that upon the temporary inability or disqualification of one or two judges of said court, that the President of the United States might designate any qualified United States circuit or district judge or judges to act in his or their place. It is furthermore to be observed that its jurisdiction was exclusively appellate, and that it was authorized not only to sit in Washington, but also to sit anywhere in the United States, "in the several judicial circuits."

In determining whether a court is an inferior court created under and subject to the provisions of Article III of the Constitution, the Supreme Court has given almost controlling influence to the tenure of office of the judges which was either given by or omitted from the act creating the court. *McAllister* v. *United States*, 141 U. S. 174, 184-186.

The imperative need of life tenure for the judges of the United States Court of Customs Appeals, the jurisdiction of which is co-extensive with the nation and which decides cases which are ofttimes directly concerned with great public issues and issues of vast financial and economic importance, need not be discussed here further than to say that at least equally important reasons exist for a

judge of this court to be "perfectly and completely independent, with nothing to influence or control him but God and his conscience" as were under consideration in *Evans* v. *Gore*, 253 U. S. 245. See remarks by Chief Justice Marshall, *Debates Va. Conv.*, 1829-1831, pp. 616, 619; Alexander Hamilton in *Federalist*, No. 79.

An examination of the legislative procedure incident to the enactment, by Congress, of Section 29 of H. R. 1438, being what is commonly known as the "Payne-Aldrich Tariff Act," in July, 1909, the debates in the Senate on July 7, 1909, the Senate committee report, and other relevant legislative matters we think indisputably shows that the framers of the law thought they were, and in fact were, creating a court whose judges would have a *life tenure in office*. The committee report sets up that one of the reasons for creating the court was that if able men devoted a lifetime to the service, they would become highly efficient in the highly technical jurisprudence incident to the settlement of customs controversies. The judges of such court were commissioned for life. *Nowhere in the statute creating this court, or in any other law, is life tenure or service during good behavior of its judges expressly granted*, nor is any definite tenure granted.

From what source, may we inquire, were the judges of this court given tenure during good behavior? There can be but one answer. Being an inferior court, created under Section 1 of Article III of the Constitution, and, as such, exercising a portion of the judicial powers of the United States, said section, by its express terms, authorized said judges to "hold their offices during good behavior." *McAllister* v. *United States*, *supra*. The two clauses in Section 1 of Article III—diminution of salary and life tenure—are coupled together in "place" and "purpose." *Evans* v. *Gore*, *supra*. It seems axiomatic that if the tenure of office and compensation provisions of Article III apply to a court created under the article, that by the same token

the limitations and prescriptions as to jurisdiction shall also apply. This conclusion seems irresistible.

Following this reasoning, it ensues that if the United States Court of Customs Appeals was not created under the authority of Article III and, therefore, not subject to and limited by the provisions of the article, that there was no tenure of existence given to its judges by legislative act, nor extended to them by the Constitution, and it would be a mere administrative tribunal created under some indefinite powers of Congress, to be recreated, if its existence is deemed essential, at the beginning of each succeeding term of Congress, and its judges would be subjected to the very things the framers of the Constitution, in providing for inferior courts with similar jurisdiction, sought to provide against. See Wilson's *Constitutional Government in the United States*, pp. 17, 142.

Here it might be well to say that the legislative proceedings in connection with the establishment of this court disclose that the section of the act creating this court was not passed by the Congress without a decided division of sentiment. See proceedings in the United States Senate and the Senate Finance Committee Report found on page 4320 of Vol. 44 of the Congressional Record of the 61st Congress, 1st Session, July 7, 1909.

The force of the contention that the judges of the United States Court of Customs Appeals have life tenure by virtue only of Article III of the Constitution is strengthened by the consideration of the fact that in the creation of the United States Circuit Court of Appeals and the United States District Courts, the judges also were given no definite tenure of office. See U. S. Stat. at Large, Vol. 26, p. 826, and R. S. (1878), Sec. 551, p. 93. Congress obviously relied upon the fact that Article III of the Constitution extended this tenure to them. As far as we know, it never has been contended anywhere that circuit courts of appeals and United States district courts were created un-

der any other authority than Article III of the United States Constitution.

It is interesting to note, in this connection, that the Court of Claims was originally created to consider matters which were not "cases" and "controversies," and that its jurisdiction was advisory and ancillary only. *United States* v. *Klein*, 13 Wall. 128, 144; *In re Sanborn*, 148 U. S. 222; *Gordon* v. *United States*, *supra*. The Supreme Court of the District of Columbia and the Court of Appeals of the District of Columbia were expressly given a tenure during good behavior, by the statute which created them. See act of March 3, 1863, 12 Stat. at Large, 762, and act of February 9, 1893, 27 Stat. at Large, 434.

In *McAllister* v. *United States*, *supra*, the giving or withholding express tenure of office to a judge in creating a court by Congress was regarded as of controlling effect in determining the character of the court. In that case a territorial judge, for the Territory of Alaska, was removed from office by President Cleveland, under the authority of a statute of Congress, before the expiration of the judge's term of office.

It was contended that the President had no authority and that Congress could give him no authority to remove a judge except in the constitutional manner. The Supreme Court held that he was a territorial or legislative judge, and not a constitutional judge, and in the course of reaching this conclusion, the Court said:

> For the reasons we have stated it must be assumed that the words "judges of the courts of the United States," in section 1768, were used with reference to the recognized distinction between courts of the United States and merely territorial or legislative courts.
>
> This view, it is contended, is not supported by the history of Congressional legislation relating to the organization of courts in the Territories. We do not assent to this proposition. The acts providing for

courts in the Territories of Orleans, Iowa, Minnesota, New Mexico, Utah, Colorado, Nevada, Dakota and Arizona, fixed the tenure of office for judges in those Territories, respectively, at four years. Those providing for courts in the Territories of Missouri, Arkansas, Florida, Oregon, Washington, Nebraska, Kansas, Idaho, Montana, Wyoming and Oklahoma fixed the tenure of judges at four years, with the addition, in some cases, of the words, "unless sooner removed"; in others, of the words, "unless sooner removed by the President", or, "and no longer," or "and until their successors shall be appointed and qualified," or "unless sooner removed by the President with the consent of the Senate." Of course, Congress would not have assumed, in the acts providing for courts in the Territories named, to limit the terms of the judges, in the modes indicated, *if it had supposed that such courts were courts of the United States of the class defined in the first section of article three of the Constitution, the judges of which hold, beyond the power of Congress to provide otherwise, during good behavior.* Nor is the view that courts in the Territories are legislative courts, as distinguished from courts of the United States, weakened by the circumstances that Congress, in a few of the acts providing for territorial courts, fixed the terms of the office of the judges of those courts during "good behavior." As the courts of the Territories were not courts the judges of which were entitled, by virtue of the Constitution, to hold their offices during good behavior, it was competent for Congress to prescribe the tenure of good behavior, as in the acts last referred to, or to prescribe, as in the other acts above referred to, the tenure of four years and no longer, or four years unless sooner removed, or four years unless sooner removed by the President, or four years unless sooner removed by the President with the consent of the Senate, or four years and until a successor was appointed and qualified. (Italics ours.)

The last above cited case and this line of reasoning would seem to afford complete authority for the conclusion that in creating the Court of Claims and in providing for

it a jurisdiction which did not measure up to the requirements of Article III, Congress did not contemplate that its judges would have a life tenure by virtue of Article III, and that, since life tenure for its judges was desired, it was necessary to expressly grant it in the act. It follows that the express grant of life tenure in this and other creative acts was not an unintentional or unnecessary provision, but was an essential one, if life tenure was desired, and that such expression points unmistakably to the kind of courts created and to the source of the power invoked in their creation.

In considering the effect of the various expressions of the Supreme Court of the United States as affecting the issue here under consideration, we have not overlooked the following statement in *Miles* v. *Graham*, 268 U. S. 501.

> • • • It is equally clear, we think, that there is no power to tax a judge of a court of the United States on account of the salary prescribed for him by law.

We have also considered the possible deduction that might be drawn from this statement when considered with the finding of the court in the case of *James* v. *United States*, 202 U. S. 401, or with the reference, by Chief Justice Taft, to "United States Judges" in the great recent case of *Myers* v. *United States*, 272 U. S. 52, 155. We think, however, that the use of the words "a court of the United States", in the *Miles* case, had reference to such an inferior court as comes within the provisions of Article III.

Without citing all the authorities pertinent, we think that Congress may, by appropriate legislation, so change the jurisdiction and powers of a judicial tribunal, which is not an inferior court, as to make it an inferior court, and which court, after such change, will be subject to the limitations of Article III of the Constitution. *United States* v. *Klein*, *supra*, seems to settle this definitely.

The Court of Claims was expressly given a life tenure in the act which created it (sec. 1049, p. 194, R. S., act of

Feb. 24, 1855). For many years the Supreme Court held that the Court of Claims might consider matters which Article III of the Constitution prevented the Supreme Court from considering. *In re Sanborn, Petitioner, supra; Gordon* v. *United States, supra.* Later legislation brought to the Court of Claims a class of cases which the Supreme Court, under its amended rules, regarded as of such character that there was no constitutional inhibition against its considering them on appeal (*De Groot* v. *United States,* 5 Wall. 419; *United States* v. *Klein, supra*), although the judgment of the Court of Claims or the Supreme Court, in such cases, was not subject to "award of execution." Congress could withhold or grant authority to pay. Thus we have an example of a judicial tribunal, obviously created under powers other than those provided for in Article III, being given a class of cases or a status which entitled it to be regarded as an inferior court under Article III (*Miles* v. *Graham, supra,*) and its judgments to be subject to review by the Supreme Court.

While the last cited case does not affirmatively say that the Court of Claims was created under the powers granted to Congress, in Article III of the Constitution, to create inferior courts, it does hold that Article III of the Constitution prevented Congress from diminishing the salary of the judges of the Court of Claims during their continuance in office, which seems to us is, in effect, a holding that the Court of Claims, as now constituted, having the protection of the provisions of Article III, as an inferior court, must necessarily be limited to the jurisdiction prescribed by such article.

In *Evans* v. *Gore, supra,* a judge of a United States district court for the Western District of Kentucky was held to be exempt from paying income tax on his salary by reason of the provision of Article III of the Constitution, which provides that the compensation of the judges "shall not be diminished during their continuance in office." A district court is an inferior court of the United States. In-

ferior courts are "ordained and established" by Congress, and not by the Constitution. Congress has never expressly given life tenure to the Supreme Court, the district courts or the circuit courts of appeals. There is no reasonable room for contention that the Constitution does not give the judges of such courts life tenure. When Congress created the United States Court of Customs Appeals, it said no more and did no more, in indicating the kind of court it was creating, than it did when it created the circuit courts of appeals and the district courts.

During the entire history of customs jurisprudence litigants in customs cases have always been given, somewhere in the procedure provided by Congress, the opportunity to present the issues before an inferior court created under Article III of the Constitution. When this court was created appeal was provided from the Board of General Appraisers to the United States Court of Customs Appeals, and no further. If this court was not a part of the judiciary created under Article III, Congress, for the first time denied customs litigants the privileges of an inferior court. Whether Congress has the right, under the Constitution, to deny customs litigants the right to submit their cases, of a certain character, to an inferior court we do not undertake to decide. Its doing so would be such a departure from the kind of legislation that it had enacted during a period of a century and a half as to point strongly, we think, to the fact that it did not intend such a result.

We are, therefore, brought to the irresistible conclusion that when Congress enacted the legislation which brought this court into existence it was proceeding under and by virtue of the authority extended to it by Article III of the Constitution and that we are, therefore, required to confine our jurisdiction to "cases" and "controversies" and for the same reasons as apply to other inferior courts and the Supreme Court.

It remains for us to determine whether or not the appeal in the instant case brings to us for review such a "case" or "controversy".

In determining this issue, we recognize that it may be difficult to harmonize the different expressions of the Supreme Court which may be applicable and that some doubt as to the correctness of our conclusion might be entertained. That it is our duty to resolve all reasonable doubts in favor of the validity of the congressional act is so fundamental and so well settled as to require no citation of authority. Equally clear and emphatic is the declared attitude of the Federal judiciary that United States courts will rigidly adhere to the jurisdictional limitations prescribed by the Constitution and will use great care to assert jurisdiction over no matter which, under the terms of the Constitution, is withheld from them. *Muskrat* v. *United States, supra.*

Muskrat v. *United States, supra,* is conceded to be the leading case on the question of what is or is not a "case" or "controversy". There Mr. Justice Day, after reviewing practically all the then existing authorities, quoted approvingly from Mr. Justice Field, of the Circuit Court, in the case of *In re Pacific Railway Commission*, 32 Fed. Rep. 241, 255, and adopted it as the language of the court as to the meaning and application of the term "cases" and "controversies". He quoted the following:

> The judicial article of the Constitution mentions cases and controversies. The term "controversies", if distinguishable at all from "cases", is so in that it is less comprehensive than the latter, and includes only suits of a civil nature. *Chisholm* v. *Georgia*, 2 Dall. 431, 432; 1 Tuck. Bl. Com. App. 420, 421. By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the Constitution,

> laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication.

In applying the *Muskrat* case to the facts in hand, we must not overlook the proposition that in that case the Supreme Court was called upon to review a decision by the Court of Claims predicated upon an act by Congress, which merely provided for the court passing upon the abstract question of whether or not a congressional enactment was valid under the Constitution, without there being any litigants in court, without any one's rights being involved or any one's status being up for determination, and that the Court there said, in effect, that such an abstract question was in no sense a case or controversy. It will be noted that the definition quoted by Justice Day states that: "The term implies the existence of *present* or *possible* adverse parties whose contentions are submitted to the court for adjudication." (Italics ours.) The contentions of no one were directly involved in the matter and, therefore, it was not a case. See *California* v. *San Pablo and Tulare Railroad Company*, 149 U. S. 308. The difference in the controlling facts before the Court in the *Muskrat* case and the facts before this court now will appear as we proceed.

In the *Postum Cereal Company* case, *supra*, the learned Chief Justice, speaking for the Court, and in holding that, on account of the "case" and "controversy" provision of Article III, the Supreme Court was prohibited from considering the appeal, said:

> • • • The decision of the Court of Appeals under §9 of the Act of 1905 is not a judicial judgment. It is a mere administrative decision. It is merely an instruction to the Commissioner of Patents by a court

which is made part of the machinery of the Patent Office for administrative purposes. In the exercise of such function it does not enter a judgment binding parties in a case as the term case is used in the third article of the Constitution. * * * This result prevents an appeal to this Court, which can only review judicial judgments. * * *

* * * For here the action of the Court of Appeals in its dismissal was dealing with something which, even if it should have been received, was not in the proper sense a judgment at all. Whatever the form of the action taken in respect of such an appeal, it is not cognizable in this Court upon review, because the proceeding is a mere administrative one.

We submit that a very different situation prevails in the case at bar. Here are real parties litigant, whose rights and status are vitally affected by the litigation. If the presence of parties to the action is the test, then the requirement is fulfilled in that particular. The legal question submitted for this Court's decision is not academic or moot, and the rights of the litigants before us are vitally affected by the judgment of this court. A question of law, involving the construction of a "law of the United States", which prescribes the rights of the litigants, is here tried, in the regular form of judicial procedure, and when decided becomes a "final" judgment and the basis of future action.

We must bear in mind that the act under consideration definitely states "that the judgment of said court shall be final, except that the same shall be subject to review by the United States Supreme Court upon certiorari applied for within three months after such judgment of the United States Court of Customs Appeals", and we think that the judgment of this court, or the judgment of the United States Supreme Court, upon the question of law involved, is binding and final as to the whole world. The parties, under authority of a law of the United States,

submitted to the tribunal below the initial determination of the question of unfair methods, etc. When the case reached this court on "a question or questions of law only" an important and valuable right between interested, present parties was to be adjudicated with "final" effect.

The question before us is: When the case reaches us is it a "case" or a "controversy"? It is not a question as to what it was in the tribunal below, but what it is when it reaches us. A long line of decisions of the Supreme Court holds that there are matters involving public and private rights, position and status which, if presented in such form that the judicial power is capable of acting thereon, become susceptible of judicial determination and that such matters may be, by Congress, brought to the cognizance of inferior courts of the United States. *Tutun* v. *United States*, 270 U. S. 568; *Fidelity National Bank and Trust Company of Kansas City et al.* v. *Swope et al.*, 275 U. S. 123; *Murray's Lessee et al.* v. *Hoboken Land and Improvement Co.*, 59 U. S. 272, 284; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447; *United States* v. *Ritchie*, 17 How. 524, *La Abra Silver Mining Company* v. *United States*, 175 U. S. 423, 453-457; *Fong Yu Ting* v. *United States*, 149 U. S. 698, 729.

We think, under the last cited cases, the instant matter is presented in such a form as to call the exercise of the judicial powers of this court in so far as the question involves the trial and adjudication, in a judicial procedure, of rights and privileges which by the judgment of this court is made "final" as to the matters involved as against all parties. Whether the importers are denied the right to import is not the question. But if it were, and their legal status had been adjudicated, adversely to them, prevention from the continuance of such unlawful status, we think, might be had. *Marbury* v. *Madison*, 1 Cranch, 137, 170; *Field* v. *Clark*, 143 U. S. 649; *Hampton, Jr., & Co.* v *United States*, 14 Ct. Cust. Appls. 350, T. D. 42030; 275 U. S.—, No. 242. The parties have had their day in court

where a definite, legal issue, involving a valuable right, is finally adjudicated The status of the importers being thus finally and definitely fixed, as the basis of future action, what future action, if any, may be taken is, to the courts, of no concern.

Is the judgment of this court in the matter at bar a "judicial judgment" or an administrative decision within the meaning of the *Postum Cereal Company* case, *supra?* We think it is the former, because it is the final, conclusive judicial determination of the fact as to whether or not the party has been guilty of unfair methods, etc., and a final and conclusive judgment applying the law to the facts, and, as such, it would be regarded as *res adjudicata* of that issue in any court whenever questioned. *Fidelity National Bank and Trust Company of Kansas City, et al.* v. *Swope, et al., supra.* And, furthermore, it could not be collaterally attacked. If a "judicial judgment" be one which is final and conclusive as between the parties on the issues involved and not subject to collateral attack, then the judgment of this court in the matters now before it meets the test and is a "judicial judgment." Such a judgment does not have to be for money, or for the recovery of a thing, or involve anything that a writ or process may enforce, but may be the determination of a status, or a right, or a privilege, or "the basis of action." *Tutun* v. *United States, supra; Interstate Commerce Commission* v. *Brimson, supra; Fidelity National Bank and Trust Company of Kansas City, et al.* v. *Swope, et al., supra.* The ultimate test is: Is the judgment final? *Postum Cereal Company, supra.*

The *Tutun* case involved the question as to whether an order of a district court granting or denying a petition for naturalization was a final decision and whether or not such a proceeding was a "case" within the meaning of Article III of the Constitution. A unanimous court held, in a very well written and well considered opinion, by Mr. Justice Brandeis, that such an order was a final decision

and was a "case" within the meaning of Article III and within the meaning of the Judicial Code, and that such a case was reviewable by the Circuit Court of Appeals. No property rights were involved, but a status was to be determined, which status, however, when declared, could be revoked or a new application filed in the same or another court. Notwithstanding this fact, the court held, citing *Hayburn's Case*, 2 Dall. 408; *United States* v. *Ferreira*, 13 How. 39; *Muskrat* v. *United States*, *supra*, that it was a case within the meaning of Article III and was triable and reviewable by the inferior courts. The learned judge, speaking for the court said

> • • • The order granting or denying a petition for naturalization is clearly a final decision within the meaning of that section. *Ex parte Tiffany*, 252 U. S. 32. This is true, although a certificate granted may be cancelled under §15 of the Naturalization Act, *United States* v. *Ness*, 245 U. S. 319, and a denial of the petition may not preclude another application for naturalization. *In re Pollock*, 257 Fed. 350. • • •
>
> • • • Whenever the law provides a remedy enforceable in the courts according to the regular course of legal procedure, and that remedy is pursued, there arises a case within the meaning of the Constitution, whether the subject of the litigation be property or status. A petition for naturalization is clearly a proceeding of that character.
>
> The petitioner's claim is one arising under the Constitution and laws of the United States. The claim is presented to the court in such a form that the judicial power is capable of acting upon it. The proceeding is instituted and is conducted throughout according to the regular course of judicial procedure. The United States is always a possible adverse party. By § 11 of the Naturalization Act the full rights of a litigant are expressly reserved to it. See *In re Mudarri*, 176 Fed. 465. Its contentions are submitted to the court for adjudication. See *Smith* v. *Adams*, 130 U. S. 167, 173-174. Section 9 provides that every final hearing must be held in open court; that upon such

hearing the applicant and witnesses shall be examined under oath before the court and in its presence; and that every final order must be made under the hand of the court and shall be entered in full upon the record. The judgment entered, like other judgments of a court of record, is accepted as complete evidence of its own validity unless set aside. *Campbell* v. *Gordon*, 6 Cranch 176; *Spratt* v. *Spratt*, 4 Pet. 393, 408. It may not be collaterally attacked. *Pintsch Compressing Co.* v. *Bergin*, 84 Fed. 140. If a certificate is procured when the prescribed qualifications have no existence in fact, it may be cancelled by suit. "It is in this respect," as stated in *Johannessen* v. *United States*, 225 U. S. 227, 238, "closely analogous to a public grant of land (Rev. Stat., § 2289, etc.,) or of the exclusive right to make, use and vend a new and useful invention (Rev. Stat., § 4883, etc.)."

The opportunity to become a citizen of the United States is said to be merely a privilege and not a right. It is true that the Constitution does not confer upon aliens the right to naturalization. But it authorizes Congress to establish a uniform rule therefor. Art. I, §8, cl. 4. The opportunity having been conferred by the Naturalization Act, there is a statutory right in the alien to submit his petition and evidence to a court, to have that tribunal pass upon them, and, if the requisite facts are established, to receive the certificate. See *United States* v. *Shanahan*, 232 Fed. 169, 171. There is, of course, no "right to naturalization unless all statutory requirements are complied with." *United States* v. *Ginsberg*, 243 U. S. 472, 475; *Luria* v. *United States*, 231 U. S. 9, 22. The applicant for citizenship, like other suitors who institute proceedings in a court of justice to secure the determination of an asserted right, must allege in his petition the fulfillment of all conditions upon the existence of which the alleged right is made dependent; and he must establish these allegations by competent evidence to the satisfaction of the court. *In re Bodek*, 63 Fed. 813, 814, 815; *In re An Alien*, 7 Hill (N. Y.) 137. In passing upon the application the court exercises judicial judgment. It does not confer or withhold a favor.

Thus we see, in this late pronouncement, an individual may bring a proceeding in a district federal court to acquire a certificate which involves no property right, but merely a status, and which certificate is only *prima facie* evidence of his status, and which may be cancelled by suit if the facts upon which the certificate was granted are afterwards judicially ascertained to be incorrect, and such a proceeding is declared to be a "case" within the meaning of Article III, section 2, because it was a matter *presented in such form that judicial action might be had upon the proof and issues presented where a status or a right was involved.*

We regard the principles announced in the recent decision of the Supreme Court of the United States in *Fidelity National Bank and Trust Company of Kansas City et al., supra*, as being conclusive authority for the position we have taken in this case. In a very logical opinion by Mr. Justice Stone, the reasoning and conclusions in *Tutun v. United States, supra*, are approved and the application of the terms "cases" and "controversies" to the issues at hand is stated in such a definite manner as to decide precisely, we think, the question before us.

The charter of Kansas City, concerning public street improvements, provided that after the city had passed its ordinance for the improvements and made an approximate estimate of the costs of the work as affecting the owners of the lands chargeable, that the city should file a proceeding in the Circuit Court of Jackson County, Missouri, against the owners of the land for the purpose of having the court determine the validity of the ordinance and the question as to whether or not the respective tracts of land should be chargeable with the lien of said work as provided by the ordinance. After judgment, if the validity of the ordinance and lien was upheld, the improvements might proceed. The object of the legal determination of such validity, as an intermediate step in the improvement

proceeding, was obviously for the purpose, among other things, of insuring the sale of the bonds. Tax bills were issued against the several benefited tracts of land, some of which bills were held by the Fidelity National Bank and Trust Company. Swope and others, being the owners of certain lands assessed, brought suit to cancel the tax bills issued against them. The proceeding was instituted in the federal court, on account of the diversity of citizenship.

One of the important questions before the Circuit Court of Appeals and the Supreme Court was as to whether the action in the State court was a "case" or a "controversy." It was, apparently, conceded that if it was a "case" or a "controversy" there, it was a "case" or a "controversy" when it reached the federal court. The Supreme Court said:

> But if the determination of the state court was *res adjudicata* according to its laws and procedure, no reason is suggested, nor are we able to perceive any, why it is not to be deemed *res adjudicata* here, if the proceeding in the state court was a "case" or "controversy" within the appellate jurisdiction of this Court, Fed. Const. Art. III, §2, so that constitutional rights asserted, or which might have been asserted in that proceeding, could eventually have been reviewed here.
>
> That this proceeding authorized by §28 of the Kansas City charter was judicial in character appears from an inspection of the statute and the record in the circuit court. The proposed improvement having been authorized, the benefit district established, the estimated cost ascertained, all by action of the city council or the board of public works essentially legislative in character, the jurisdiction of the state court was invoked in an adversary proceeding to determine the validity of the liens imposed or to be imposed under the ordinance. That court is a court of general jurisdiction, having plenary power to determine all questions arising under the state law or the laws and Constitution of the United States. Section 2436 Mo. Rev. Stat. 1919; *Schmelzer* v. *Kansas City*, 295 Mo.

322. These questions are required to be determined in a trial in accordance with the laws and constitution of the State. The sole duty and power of the court is to pass upon questions of law and to inquire judicially into the facts so far as necessary to ascertain the applicable rules of law. See *Keller* v. *Potomac Elec. Co.*, 261 U. S. 428, 440. Under this procedure, the judgment to be awarded finally determines, subject to appeal, the validity of the ordinance authorizing the improvement, the limits of the benefit district, the method of apportioning benefits, and the validity of the proposed liens. That the issues thus raised and judicially determined would constitute a case or controversy if raised and determined in a suit brought by the taxpayer to enjoin further proceedings under the ordinance could not fairly be questioned. Compare *Risty* v. *Chicago, R. I. & Pac. Ry. Co.*, *supra*. They cannot be deemed any the less so because through a modified procedure the parties are reversed and the same issues are raised and finally determined at the behest of the city. • • •

While ordinarily a case or judicial controversy results in a judgment requiring award of process of execution to carry it into effect, such relief is not an indispensable adjunct to the exercise of the judicial function. Naturalization proceedings, *Tutun* v. *United States*, 270 U. S. 568; suits to determine a matrimonial or other status; suits for instructions to a trustee or for the construction of a will, *Traphagen* v. *Levy*, 45 N. J. Eq. 448; bills of interpleader, so far as the stakeholder is concerned, *Wakeman* v. *Kingsland*, 46 N. J. Eq. 113; bills to quiet title where the plaintiff rests his claim on adverse possession, *Sharon* v. *Tucker*, 144 U. S. 533; are familiar examples of judicial proceedings which result in an adjudication of the rights of litigants, although execution is not necessary to carry the judgment into effect, in the sense that no damages are required to be paid or acts to be performed by the parties. *Cf. Kennedy* v. *Babcock*, 19 Misc (N. Y.) 87; *Cohen* v. *N. Y. Mutual Life Ins. Co.*, 50 N. Y. 610, 625. Nor is it essential that only established and generally recognized forms of remedy should be invoked. "Whenever the law pro-

vides a remedy enforceable in the courts according to the regular course of legal procedure, and that remedy is pursued, there arises a case within the meaning of the Constitution, whether the subject of the litigation be property or status." *Tutun* v. *United States, supra,* 577. Thus, naturalization proceedings, *Tutun* v. *United States, supra,* or a special statutory proceeding to determine judicially whether the claim made by a domestic corporation against a foreign country upon which an award had been made by a United States commissioner pursuant to treaty, had been furthered by fraud, the statute authorizing distribution of the fund in accordance with the judgment, *La Abra Silver Mining Co.* v. *United States,* 175 U. S. 423, are cases or controversies within the meaning of the Constitution.

Other cases might be quoted from at length to the same effect. Among them, prominently, are *Murray's Lessee et al.* v. *Hoboken Land and Improvement Co., supra,* and *Interstate Commerce Commission* v. *Brimson, supra.* In the first of these cases it appears that Congress had authorized a collector to bring before a district court the question of how much he was indebted to the Government. The act provided that the submission of the question to the district court suspended the distress warrant issued by the Solicitor of the Treasury Department and that, in effect, the judicial determination of the amount due fixed the sum to be collected on the warrant. The court, in holding that such a proceeding brought before the court a matter which was properly the subject of judicial cognizance, said:

> To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for *judicial determination. At the*

same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper. Equitable claims to land by the inhabitants of ceded territories form a striking instance of such a class of cases; and as it depends upon the will of congress whether a remedy in the courts shall be allowed at all, in such cases, they may regulate it and prescribe such rules of determination as they may think just and needful. Thus it has been repeatedly decided in this class of cases, that upon their trial the acts of executive officers, done under the authority of congress, were conclusive, either upon particular facts involved in the inquiry or upon the whole title. Foley v. Harrison, 15 How. 433; Burgess v. Gray, 16 How. 48;—— v. The Minnesota Mining Company at the present term. (Italics ours.)

It is true, also, that even in a suit between private persons to try a question of private right, the action of the executive power, upon a matter committed to its determination by the constitution and laws, is conclusive. Luther v. Borden, 7 How. 1; Doe v. Braden, 16 How. 635.

To apply these principles to the case before us, we say that, though a suit may be brought against the marshal for seizing property under such a warrant of distress, and he may be put to show his justification; yet the action of the executive power in issuing the warrant, pursuant to the act of 1820, passed under the powers to collect and disburse the revenue granted by the constitution, is conclusive evidence of the facts recited in it, and of the authority to make the levy; that though no suit can be brought against the United States without the consent of congress, yet congress may consent to have a suit brought, to try the question whether the collector be indebted, that being a subject capable of judicial determination, and may empower a court to act on that determination, and restrain the levy of the warrant of distress within the limits of the debt judicially found to exist.

The question before us, now, is presented *in such form* as to *bring it under the judicial power* and "is presented in such form that the judicial power is capable of acting" thereon and is "susceptible of judicial determination."

In *Interstate Commerce Commission* v. *Brimson, supra,* a circuit court of the United States was called upon to direct witnesses to appear and testify before the Interstate Commerce Commission, and it was contended that the matter was not a case or a controversy and that, therefore, the court, being an inferior court, was without jurisdiction under Article III of the Constitution. The Supreme Court held to the contrary, notwithstanding the fact that the proceeding was merely in the nature of an aid to the Interstate Commerce Commission in the discharge of an administrative duty, and notwithstanding the fact that if the Interstate Commerce Commission dismissed the proceeding, the mandate of the Circuit Court was without further effect. It was the determination of a status, the judicial determination of a controverted matter, which was to be a part of the proceeding, administrative in character, but was a "final and indisputable basis of action" as between the Commission and the defendants.

Mr. Justice Harlan, speaking for the Court, said:

> • • • If it be adjudged that the defendants are in law, obliged to do what they have refused to do, that determination will not be merely ancillary and advisory, but, in the words of *Sanborn's case,* will be a "final and indisputable basis of action," as between the Commission and the defendants, and will furnish a precedent in all similar cases. It will be as much a judgment that may be carried into effect by judicial process as one for money, or for the recovery of property, or a judgment in mandamus commanding the performance of an act or duty which the law requires to be performed, or a judgment prohibiting the doing of something which the law will not sanction. It is none the less the judgment of a judicial tribunal dealing with questions judicial in their nature, and pre-

> sented in the customary forms of judicial proceedings, because its effect may be to aid an administrative or executive body in the performance of duties legally imposed upon it by Congress in execution of a power granted by the Constitution.

If we paraphrase the above language of the Supreme Court, we can say, with equal force, that if it be adjudged that the defendants or respondents in the pending case are violators of the law under consideration, that determination "will not be merely ancillary and advisory," but will be a "final and indisputable basis of action" for future proceedings. See *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25.

We cannot agree with the argument made by the appellees, the Bakelite Corporation et al., that our judgment in this case must be one that will be enforceable by execution or process. If it declares or denies the existence of a right or a status (and does so conclusively and finally) which in turn affects a valuable interest or right, and otherwise meets the requirements of a "case" and "controversy," under the foregoing decisions cited, it certainly is such. *Fidelity National Bank and Trust Company of Kansas City et al.* v. *Swope et al., supra.*

Let us suppose that this court, and the Supreme Court, reviewing our judgment, should hold that the violation of a patent right is, in law, not an unfair method of competition or an unfair act in importation. Could the President lawfully hold that it was? We think not. The statute would seem to leave the definition of these terms to the courts as it did in the Federal Trade Commission Act. *Federal Trade Commission* v. *Gratz et al.*, 253 U. S. 421; *Federal Trade Commission* v. *Curtis Publishing Company*, 260 U. S. 568. As an illustration of this conclusion, let us again suppose that after this court or the Supreme Court had held that the violation of a patent right was not such an "unfair method," etc. the President would decide that it was, and such decision would cause the collec-

tor to reject the entry of respondent's merchandise, and he would litigate the matter on the theory that the question had been adjudicated. What could any court do but hold that as between the parties the matter had been finally and conclusively determined in the court and that its decision was *res adjudicata?*

Section 316 of the Tariff Act of 1922, which is now in part before us for construction, in many respects is an absolute and precise copy of the Federal Trade Commission Act, U. S. Stat. at Large, Vol. 38, part 1, chapter 311, p. 717, and the Anti-Trust Act (Clayton Act), U. S. Stat. at Large Vol. 38, p. 730.

The Federal Trade Commission is, admittedly, an administrative body and its acts have been declared to be administrative in character, and not judicial. *Federal Trade Commission* v. *Eastman Kodak Company et al.*, 274 U. S. 619. The Federal Trade Commission Act, however, provides that unfair methods of competition in commerce are unlawful. The Act at bar provides that "unfair methods of competition and unfair acts in importation" are unlawful. Both acts provide that the respective bodies, the Federal Trade Commission and the United States Tariff Commission, may institute proceedings for determining the question of fact as to whether or not the party complained of is in violation of the law in the respect indicated. The Federal Trade Commission, after finding its facts, is authorized to issue an order requiring such person to desist from the unlawful practice. If the person so ordered fails to comply, the Commission may apply to the Circuit Court of Appeals for the enforcement of its order, or the party so ordered may obtain a *review* or file a petition to set aside the order, which proceeding is nothing more than an appeal, regardless of what it may be styled in the Act. *United States* v. *Ritchie, supra; Stephens* v. *Cherokee Nation*, 174 U. S. 445, 477. The Commission files its record in that court, which issues notice upon the same, and determines

the questions therein, and *may affirm, modify or set aside* the orders of the Commission.

In the Federal Trade Commission Act, as in the Act before us, it is provided that the findings of the Commission as to the facts, if supported by the testimony, shall be conclusive. In both Acts the same provision is made for taking new testimony. When the matter is before the Federal Trade Commission its finding is not a judgment, and it has no process to enforce its decree, but when the matter gets into the Circuit Court of Appeals or the Supreme Court of the United States it is there "presented in such form" that judicial cognizance may be taken thereof and a final, binding judgment, as to the question passed upon, may be had.

What has been said here as to the review by a Circuit Court of Appeals of an order of the Federal Trade Commission is also true as to the enforcement provision of the Clayton Anti-Trust Act. The Clayton Anti-Trust Act and the United States Tariff Commission provision under consideration seem to be almost in the exact phraseology of the Federal Trade Commission Act.

In *Interstate Commerce Commission* v. *Brimson, supra*, the Supreme Court held that the proceeding before a circuit court of appeals to compel witnesses to answer questions before the Interstate Commerce Commission was not repugnant to the Constitution as not being a "case" or "controversy". As far as we have been able to ascertain, the power of such court to review and "reverse, modify and set aside" the orders of the Interstate Commerce Commission and the Federal Trade Commission has never been further questioned. Certainly these proceedings are in the nature of an *aid or a help to an administrative body in the performance of a purely administrative duty.* They are not "cases" before the commissions and they are not independent actions before the court. They are, however, held to be "cases" although the identical issues arose and were passed upon by an administrative body.

True enough, the judgment of the Circuit Court of Appeals in some of the matters it reviews from the two commissions mentioned may have the matter presented to them in such form that process may reach out and execute the judgment, but in others, as we have seen, this does not maintain, and, in our view of the matter, it is not essential that the action should be such an one as to require or necessitate process. *Tutun* v. *United States, supra; Murray's Lessee et al.* v. *Hoboken Land and Improvement Company, supra; Fidelity National Bank and Trust Company of Kansas City et al.* v. *Swope et al., supra.*

On October 7, 1922, President Harding issued his executive order, which is still in full force and effect, and is as follows:

> It is ordered, that all requests, applications, or petitions for action or relief under the provisions of sections 315, 316 and 317 of Title III of the Tariff Act approved September 21, 1922, shall be filed with or referred to the United States Tariff Commission for consideration and for such investigation as shall be in accordance with law and the public interest, under rules and regulations to be prescribed by such Commission. See *Opinions of Attorneys General,* Vol. 34, p. 79.

Without suggesting what weight the indicated executive interpretation of the Act involved in the order is to be given in the consideration of the question at hand, we regard it as of some importance as illustrating the operation of the Act when given a certain construction.

The foregoing considerations lead us to the conclusion that the matters presented in the instant appeal are presented in such form as to call for the exercise of the judicial powers of this inferior court, and that our exercise of the same is not in contravention of the provisions of the Constitution.

The motion of the Bakelite Corporation et al. is, therefore, overruled.

CONCURRING OPINION

BARBER, *Judge.*

I concur in the conclusions reached by the court, but it would, in my opinion, be more in conformity with the established practice of this court to enter judgment denying the motion to dismiss without now handing down an opinion.

The only controverted issue is whether or not a case or controversy, within the meaning of Section 2 of Article III of the Constitution, is presented, of which this court, as an inferior court, ordained and established by Congress under Section 1 of said article, has jurisdiction. An opinion on that question can better be written after the case has been heard on the merits. So far as I recall, our practice has been, when a motion to dismiss for want of jurisdiction *is denied*, to discuss all relevant questions in the opinion handed down when the case is heard and decided upon the merits.

See *Atlantic Transport Co.* v. *United States*, 5 Ct. Cust. Appls. 373, T. D. 34872; *Fish* v. *United States*, 12 Ct. Cust. Appls. 308, T. D. 40315.